No. 83-371

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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1.a. Respondent's principal argument (see Br. in Opp. 2-3, 16-18, 23-24) is that this Court should deny review because the decision below does not concern "garden variety administrative activities" but is limited to a "highly unusual factual setting" (Br. in Opp. 2). However, respondent fails to identify any "unusual" factors that limit the decision's applicability.

Respondent relies chiefly upon a single three-sentence passage from the court of appeals' decision. (Respondent quotes all or part of this passage no fewer than seven times (Br. in Opp. i, 2-3, 7, 16, 21, 22, 23).) The court of appeals wrote (Pet. App. 43a):

> The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the

> communications industry. They are, in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

We see nothing in this passage that would in any meaningful way limit the court of appeals' decision to "highly unusual" sets of facts. The passage makes clear that the Sunshine Act does not apply to "chance meetings," "social gatherings," or informal discussions attended solely by agency members. The passage also states that, to be covered, discussions must be about something in particular ("[t]hey focus on concrete issues * * *") and must have a serious purpose ("They * * * are conducted to build a 'consensus' that will have far-reaching effects on the structure of the communications industry."). But after these restrictions have been applied, a vast array of administrative activities remain: all prearranged discussions that have a topic and purpose and are attended by outside parties, as well as agency members.

Nor is there a meaningful limit implicit in the vague and conclusory phrase "public business of the greatest import," which respondent repeats five times (Br. in Opp. i, 2-3, 7, 16, 21). What is "public business of the greatest import"? How are the FCC and other agencies to know what the courts will regard as sufficiently important to fall within that description? Similarly, what is meant by "an integral part of the Commission's policymaking process"? (see Br. in Opp. 7, 16, 23). These phrases provide little guidance; they leave the courts with a vast ad hoc discretion to expand the coverage of the Act on the basis of their subjective evaluations of the import and relevance of the particular discussions held by Commission members.

Respondent notes (Br. in Opp. 22) the court of appeals' statement (Pet. App. 37a) that the Commissioners who attended CP meetings "convey[ed] the information and

views 'exchanged' at the meetings to the full Commission for its consideration." But that is hardly "highly unusual"; in fact, it is a natural occurrence whenever some members of a multimember agency attend a gathering related to the agency's work.[1]

Finally, respondent points to (Br. in Opp. 16) the court of appeals' statement (Pet. App. 43a) that the Sunshine Act "does not *per se* forbid all informal off-the-record discussions between a quorum of an agency [or subdivision] and outside parties * * *." The very fact that the court found it necessary to express such a disclaimer indicates the breadth of its decision. In the court of appeals' view, the Sunshine Act does not necessarily apply to *every* informal discussion attended by outside parties and a quorum of the agency or a subdivision. (It should be noted that in the case of the FCC, a quorum of its three-person standing committees is two members). But the court apparently contemplated that

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[1]Respondent also relies upon (Br. in Opp. 5, 24) the court of appeals' statement (Pet. App. 39a) that the FCC chose "the CP as the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements." But in order to understand what this statement means, it is necessary to recall that this case was decided on cross motions for summary judgment on the basis of those facts that were not in dispute (see pages 4-5, *infra*). While respondent contended that the Commission was using the CP sessions to negotiate on behalf of Graphnet and Telenet (Pet. App. 7a), the Commission maintained that the CP sessions merely involved " 'the exchange of information and views' " for the purpose of " 'improv[ing] foreign understanding of the bases for and nature of [the Commission's] procompetition policies' " (*id.* at 6a). The court of appeals' statement upon which respondent relies cannot properly mean more than what the Commission conceded. It therefore means only that the CP sessions may have assisted Graphnet and Telenet by informing the foreign telecommunications administrators concerning the bases for and nature of the Commission's policies. We see nothing "highly unusual" (Br. in Opp. 2) about discussions with such a general informative or educational purpose.

most such discussions would be covered and stated (*ibid.*) that "an agency's burden of persuasion must be especially great in such situations."

In sum, respondent has failed to show that the court of appeals' decision is based upon any unusual facts that limit its potential applicability. As pointed out in our petition (Pet. 20), "[u]nder the court of appeals' approach, the Act would appear to apply whenever two or more agency members acting under what may be deemed unofficial agency authorization attend a gathering at which any matter viewed by the courts as related in some significant way to the agency's business is discussed."

b. Respondent seeks to portray the court of appeals' holding more narrowly by quoting extensively (see Br. in Opp. 5, 6-7, 17) from a portion of the court's opinion (Pet. App. 6a-7a) that summarized the parties' factual assertions concerning the nature of the CP meetings. The court of appeals' decision is, however, not based on the facts contained in those assertions. The court began this portion of its opinion by noting that "[t]he specific nature of these off-the-record discussions is sharply contested * * *" (*id.* at 6a). The court then summarized the Commission's contentions (*id.* at 6a) and those of respondent (*id.* at 7a). Since the Sunshine Act issue was decided on cross motions for summary judgment (*id.* at 12a), it is clear that the court of appeals' decision was not based upon these "sharply contested" facts.

Respondent's brief obscures this point by commingling the court's explanation of the basis for its decision with respondent's own factual assertions, as summarized by the court of appeals (see Br. in Opp. 5, 6-7). (This is most apparent in the long quotation on page seven of the brief in opposition. The part of the quotation preceding the asterisks is taken from the court of appeals' summary of

respondent's factual assertion (Pet. App. 7a), while the portion following the asterisks, which is part of the court's own conclusions, occurs some 30 pages later in the opinion (*id.* at 43a)). Respondent then suggests that the court of appeals accepted its version of the disputed facts (Br. in Opp. 17-18) and that we are asking this Court to "review the fact-finding of the lower courts" (Br. in Opp. 16). In fact, however, the courts below did not make findings on the "sharply contested" factual issues. Instead, the court of appeals' decision was based upon the — relatively few — undisputed facts concerning the nature of the CP meetings. Those facts do not effectively limit the court's decision to "highly unusual" situations.[2]

It may be, as we stated in the petition (Pet. 20), that the court of appeals in future cases would restrict the apparent breadth of its decision in this case. But unless agencies take action arguably in violation of the decision below — something they are properly reluctant to do — such future cases will not arise. Unless reversed, therefore, the decision below will have a chilling effect on proper and useful activities by agency members.[3]

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[2]Respondent contends (Br. in Opp. 24) that the decision below will not have an adverse impact because CP sessions can be closed under 5 U.S.C. 552b(c)(9)(B) on the ground that "the premature disclosure" of the discussions " 'would . . . be likely to significantly frustrate implementation of a proposed agency action.' " This argument misses the point for two reasons. First, the issue here is not when but whether the CP discussions must be made public and thus the applicability of 5 U.S.C. 552b(c)(9)(B) is doubtful. Second and more important, even if the CP issues fell within one of the Sunshine Act's narrow exceptions, the court of appeals' decision applies to many informal gatherings not protected by any exception. The harmful effects of the court of appeals overly broad interpretation of the Act's coverage are not cured by the Act's narrow exceptions.

[3]ITT's assertion (Br. in Opp. 13) that "the decisions of the lower courts have not halted the consultative process" is partially correct, but misses the point. There have been CP meetings following the district

2. Respondent's contentions concerning the correct interpretation of the Sunshine Act (Br. in Opp. 18-23) were substantially addressed in the petition and do not require extended response at this time.

Respondent concedes (Br. in Opp. 21) that the court of appeals simply deleted the element of "deliberations" from the statute. Respondent's contention (Br. in Opp. 21) that this is what Congress intended is squarely at odds with well-established canons of statutory construction and is not supported by the legislative history. Respondent's claim (Br. in Opp. 21) that the court of appeals was not called upon to decide this issue is belied by the court's opinion. The court noted (Pet. App. 37a) that " '[d]eliberations' might be read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency." But the court rejected that interpretation (*id.* at 37a-45a) and also expressly rejected the distinction drawn by the Commission "between an agency's predecisional activities and its postdecisional efforts to implement interpret, and promote its policies" (*id.* at 39a).

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court's decision. However, as ITT surely knows, those meetings involved only facilities planning consultations. As pointed out in the petition (Pet. 6-7), such meetings have traditionally been conducted, by voluntary agreement of all parties, in open session with carrier representatives present. See also Pet. App. 78a. CP meetings held after the district court decision did not involve the discussion of telecommunications policy issues that were considered in closed CP sessions that led to this litigation. We certainly did not mean to suggest in our petition that the decision of the court of appeals had or would prevent *any* contact between FCC members and foreign administrations. But there can be little doubt that the lower court's decision here has and will restrict agency members' ability to discuss and exchange information with their foreign counterparts on sensitive international telecommunications policy issues in a manner never intended by Congress when it adopted the Sunshine Act.

In response to our argument that the Sunshine Act applies to agency subdivisions only if they are lawfully authorized to act on the agency's behalf, respondent contends for the first time (Br. in Opp. 20) that the Telecommunications Committee was officially authorized to act on the Commission's behalf at the CP sessions because the Committee is authorized to act on certain applications for permits to construct international communications facilities. However, the court of appeals' decision was not based on this ground, and respondent has never claimed that the Committee members were considering such applications during the CP sessions.

Respondent argues (Br. in Opp. 21) that the CP sessions "result[ed] in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)) because "the lower courts found [that the FCC's] representatives were seeking to coerce or cajole the foreign administrations into giving operating agreements to GTE and Graphnet." No such findings were made. The Commission has always contested respondent's contention that the attending Commissioners negotiated with their foreign counterparts (Pet. App. 7a), and this factual dispute was not and could not have been adjudicated at the summary judgment stage.[4]

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[4]Respondent contends (Br. in Opp. 21-22) that even if the attending commissioners merely exchanged information with their foreign counterparts, that would constitute "the joint [conduct or disposition] of official agency business," principally because some of the information exchanged might have a bearing upon future FCC actions. This was not the basis for the court of appeals' holding and in any event, if "the joint conduct or disposition of agency business" occurs whenever agency members are exposed to information that may be related in some way to some future agency action, the Sunshine Act's coverage will be stretched to an unreasonable degree not intended by Congress.

3. Respondent contends (Br. in Opp. 25-27) that the district court had jurisdiction to entertain its ultra vires claim, despite the fact that exclusive jurisdiction to review FCC orders is vested in the courts of appeals, because "[t]he FCC's efforts to negotiate with foreign governments * * * did not, and could not, result in a 'final order' reviewable in the Court of Appeals" (Br. in Opp. 25). This assertion is false, as our petition pointed out (Pet. 23-24).

First, there is no real distinction between the issue raised in respondent's ultra vires count and its rulemaking petition, the denial of which was reviewed by the court of appeals.

Second and perhaps more important, even if there were some difference between the two issues, respondent could have obtained court of appeals review of the precise issue raised in its ultra vires count by couching its rulemaking petition in slightly different terms or by petitioning the Commission for a declaratory ruling (47 C.F.R. 1.2). Any subsequent Commission order would then have been subject to review in the court of appeals.

Respondent argues (Br. in Opp. 26) that the administrative record in this case was inadequate and that district court proceedings were therefore required. But, as noted in our petition (Pet. 24), the administrative record could have been supplemented on remand to the Commission or to a special master. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244-245 (1980); 28 U.S.C. 2347. Inadequacy of the administrative record consequently provides no ground for circumventing the exclusive procedures for judicial review established by Congress.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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